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**VIA E-MAIL**

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW-325  
445 12<sup>th</sup> Street, S.W.  
Washington D.C. 20554

**RE: WC Docket Nos. 06-125, 06-74**

Dear Ms. Dortch:

In their petitions for forbearance from regulation of business broadband services, both AT&T and legacy BellSouth seek the elimination of common carrier regulation of Ethernet and optical services (collectively, “business broadband services”).<sup>1</sup> AT&T and legacy BellSouth have now withdrawn their petitions for forbearance to the extent that they initially encompassed interexchange services, leaving only the special access component of business broadband services subject to the pending petitions.<sup>2</sup> After AT&T and BellSouth filed their petitions for forbearance in 2006, the Commission approved the merger of AT&T and BellSouth subject to conditions.<sup>3</sup> The Merger Conditions include the requirements that the merged firm (1) reduce tariffed prices for DS1, DS3 and Ethernet service in areas subject to Phase II pricing flexibility to levels equal to or below the rate that

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<sup>1</sup> See AT&T Petition for Forbearance, WC Dkt. No. 06-125 (July 13, 2006) at App. A (listing the services subject to the petition); BellSouth Petition for Forbearance, WC Dkt. No. 06-125 (July 20, 2006) at App. A (same).

<sup>2</sup> See Letter from Robert W. Quinn, Jr. to Marlene H. Dortch, WC Dkt. No. 06-125 (Sept. 12, 2007).

<sup>3</sup> See *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) at App. F (“Merger Conditions”). Since AT&T and BellSouth drafted the Merger Conditions and submitted them to the Commission as part of the merger proceeding, they should be subject to the rule applicable in the tariff context that any ambiguities in the Merger Conditions be construed against AT&T and BellSouth. See *Halprin, Temple, Goodman & Sugrue, v. MCI*, Order on Reconsideration, 14 FCC Rcd 21092, n.50 (1999) (“It is well established that any ambiguity in a tariff is interpreted against the party filing the tariff”).

AT&T and legacy BellSouth charge for the same services subject to price cap regulation outside of Phase II areas, (2) reduce Ethernet prices by 15 percent in Phase II areas where the ILEC's Ethernet prices are not subject to price caps, (3) not increase the rates for any in-region, interstate special access service on file at the time of the merger closing date and as modified by the price reductions required in Phase II areas, (4) not oppose mediation of disputes regarding special access or inclusion of such disputes in the Accelerated Docket, and (5) comply with regulations governing interstate volume/term pricing flexibility contracts for special access. Importantly, the Merger Conditions also include the requirement that AT&T and BellSouth "will not seek . . . any future grant of forbearance that diminishes or supersedes the merged entity's obligations or responsibilities under the merger commitments during the period in which those obligations are in effect."

AT&T's and legacy BellSouth's request for the elimination of common carrier regulation applicable to business broadband special access services violates the forbearance provision in the Merger Conditions. By not withdrawing their petitions for forbearance and by aggressively arguing in filings made in the above-referenced docket that the Commission should grant the petitions, AT&T and BellSouth "seek" the forbearance set forth in the petitions.<sup>4</sup> Furthermore, the forbearance they seek would "diminish" and "supersede" their obligations to comply with all of the Merger Conditions pertaining to special access. For example, if their business broadband special access services were classified as non-common carrier services, the tariffing requirements of the Communications Act would not apply to AT&T's and BellSouth's business broadband special access services. *See* 47 U.S.C. § 203 (establishing tariffing requirements for "common carriers"). AT&T and legacy BellSouth therefore "seek" the adoption a new policy under which they would be free to withdraw, at any time, the tariffs needed to comply with their "obligation" to offer services at the tariffed rates as specified in the Merger Conditions. This outcome would unquestionably "diminish," indeed it would eviscerate, the special access rate reduction and rate freeze Merger Conditions. The new detariffed regime would also "supersede" the regulatory regime of price limits as enforced via tariffed rates in the Merger Conditions. Furthermore, granting AT&T and legacy BellSouth non-carrier status would "diminish" and "supersede" the Merger Conditions governing volume/term agreements and dispute resolution since, the Communications Act provisions under which the FCC would enforce these provisions apply only to common carriers. *See id.* at §§ 201, 202, 206-208. Accordingly, the Commission should deem the pending petitions for forbearance null and void in their entirety.

But even if the Commission were to somehow understand AT&T's and legacy BellSouth's petitions as including as a subsidiary element a request for non-dominant regulation, and there is no evidence that they do, AT&T and legacy BellSouth would thereby again "seek" forbearance that would "diminish" or "supersede" their obligations under the Merger Conditions. *First*, a request for forbearance from dominant carrier regulation would mean that AT&T and legacy BellSouth "seek" the elimination of, among other things, the requirement that dominant carriers file tariffs that propose rate increases at least 15 days before they take effect. *See* 47 U.S.C. § 61.58(a)(2)(i). In *lieu* of dominant carrier tariffing requirements, including the 15 day advance notice for rate increases, nondominant classification would allow AT&T and legacy BellSouth to file rate increases on one day's notice and

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<sup>4</sup> Under the merger conditions, AT&T and legacy BellSouth would be prohibited from "giving effect to" forbearance adopted by the FCC on the agency's own motion.

such rate increases would be presumed reasonable.<sup>5</sup> In other words, if non-dominant classification were adopted, these rules would preclude prior FCC review of and would treat as presumptively lawful the very rate increases that are prohibited under the Merger Conditions.<sup>6</sup> This change would clearly “diminish” the special access Merger Conditions and would “supersede” the regulatory regime established therein in which rate increases are prohibited for special access.

*Second*, elimination of dominant carrier regulation would include the elimination of price regulation for the special access broadband business services covered by the AT&T and legacy BellSouth petitions for forbearance. As mentioned, the Merger Conditions require that AT&T and legacy BellSouth offer Ethernet service in Phase II areas at rates that do not exceed the rates for the same service in areas subject to price cap regulation. If price cap regulation were eliminated, however, there would be no price cap Ethernet rates that could be used as the basis for setting the Ethernet rate ceiling established in the Merger Conditions. Here again, forbearance from dominant carrier regulation would “diminish” the price ceiling Merger Conditions -- in this case for Ethernet services -- and would cause the Merger Conditions to be “superseded” by a regulatory regime in which AT&T and legacy BellSouth would be freed almost entirely from rate regulation.

*Third*, treating AT&T and legacy BellSouth as non-dominant in the provision of the business broadband special access services at issue would exempt those carriers from the requirement under Section 211(a) that they file with the Commission contracts entered into with other common carriers.<sup>7</sup> Eliminating this requirement for business broadband special access contracts would diminish the Commission’s ability to oversee the enforcement of the Merger Conditions governing interstate volume/term pricing flexibility contracts for special access. In this regard, the AT&T and legacy BellSouth “seek” forbearance that would “diminish” their obligations under the Merger Conditions.

*Fourth*, treating AT&T and legacy BellSouth’s provision of business broadband services as non-dominant would eliminate the dominant carrier regulations requiring prior FCC authorization for discontinuing, reducing or impairing service offerings. *See* 47 C.F.R. §§ 63.60-63.90. Eliminating

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<sup>5</sup> *See Tariff Filing Requirements for Nondominant Common Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993).

<sup>6</sup> In adopting the one day advance notice rule for nondominant carriers, the Commission assumed it would not need to review nondominant carriers’ rate increases and it implicitly conceded that it would only be able to review the lawfulness of nondominant carrier rate increases after the tariff in question takes effect. *See id.* ¶ 23. Such post-hoc review would likely preclude the Commission from adopting a remedy that is effective back to the time of the effective date of the tariff, thereby essentially rendering the Commission powerless to stop rate increases in violation of the Merger Conditions.

<sup>7</sup> *See* 47 C.F.R. § 43.51(b)(1) (exempting nondominant carriers from the duty to file contracts); *Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 43.74 of the Commission’s Rules To Eliminate Certain Reporting Requirements*, Report and Order, 1 FCC Rcd 933, ¶¶ 8-11 (1986), modified by *Tariff Filing Requirements for Nondominant Common Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752, n.7 (1993), *Tariff Filing Requirements for Nondominant Common Carriers*, 10 FCC Rcd 13653, ¶¶ 18-19 (1995).

these requirements would essentially mean that AT&T and legacy BellSouth could evade the rate requirements in the Merger Conditions by withdrawing or reducing their special access service offerings. In this manner as well, nondominant classification would “diminish” the rate reduction and rate freeze regulations in the Merger Conditions and would at least partially “supersede” those regulations with a more permissive regulatory regime.

In sum, the petitions for forbearance from regulation of business broadband service directly conflict with the prohibition on seeking forbearance that diminishes or supersedes the requirements in the Merger Conditions. The forbearance requests themselves violate this forbearance provision and no amount of promises from AT&T and legacy BellSouth that they will nevertheless comply with the Merger Conditions even if granted forbearance can save them. The question is whether they “seek” the relief in question, and, as explained, they clearly do. Accordingly, the Commission should deem the pending AT&T and legacy BellSouth petitions for forbearance null and void.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), a copy of this notice is being filed electronically in the above-referenced proceeding. Please contact me if you have any questions.

Respectfully submitted,

/s/

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